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August 29, 2003

HAND DELIVERY

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Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

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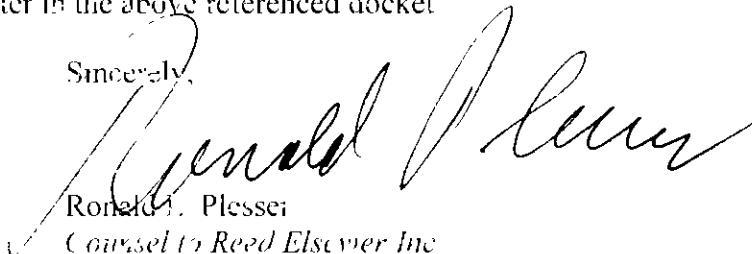
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re OMB Control No. 3060-0519
*Rules and Regulations Implementing the Telephone Consumer Protection Act of
1991*
CG Docket No. 02-278

Dear Ms. Dortch:

Enclosed is Reed Elsevier Inc.'s letter to the Office of Management and Bureau regarding information collection requirements of Section 64.1200(a)(3)(i) of the FCC's rules, as amended, requiring a signed, written consent to receiving facsimile advertisements. 47 C.F.R. § 64.1200(a)(3)(i). Please include this letter in the above referenced docket.

Sincerely,


Ronald L. Plessey
Counsel to Reed Elsevier Inc.

RLP/co
Enclosures

cc: Leslie Smith (FCC)
Steven Manzo

014

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August 29, 2003

VIA E-MAIL AND HAND DELIVERY

Kimberly A. Johnson
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Information Policy and Technical Branch
New Executive Office Building
Room 10236
725 17th Street
Washington, DC 20503

Re: OMB Control No. 3060-0519
Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991

Dear Ms. Johnson.

Background

On behalf of Reed Elsevier Inc. ("Reed Elsevier"), and pursuant to the Paperwork Reduction Act, 44 U.S.C. § 3507(b) (the "PRA") and publication in the Federal Register of the Federal Communications Commission's (the "FCC") Report and Order in the above-referenced proceeding (CG Docket No. 02-278, FCC 03-153) (the "TCPA Order"),¹ we hereby submit comments to the Office of Management and Budget ("OMB") regarding the new information collection requirements of Section 64.1200(a)(3)(i) of the FCC's rules, as amended, requiring a signed, written consent to receiving facsimile advertisements (the "Fax Consent Rule"). 47 C.F.R. § 64.1200(a)(3)(i)

¹ 68 Fed. Reg. 44144 (July 25, 2003)

Reed Elsevier is one of the world's leading publishing and information companies, employing more than 20,000 people in the United States. Reed Elsevier provides critical information in both hard copy and electronic formats to the government, scientific, legal, educational, and business communities. Its Comments, its Motion for Stay and its Petition for Reconsideration² (collectively, the "Filings") in the above-referenced proceeding contain detailed descriptions of Reed Elsevier's various subsidiaries and how they rely on faxing to communicate with customers. We incorporate by reference hereto the facts presented in the Filings.

Each of Reed Elsevier's divisions, which include the companies briefly described below and more fully described in the Filings, only fax in the business-to-business context, to existing customers and individuals who have affirmatively expressed interest in becoming customers. These faxes include: communications that relate to transactions and do not contain any material that constitutes advertising; faxes that do not have the primary purpose of advertising, but may contain an advertisement; and faxes that are entirely advertisements.

- Reed Business Information ("RBI") is the largest publisher of business and professional publications in the United States. RBI provides business information through more than 150 targeted print magazines, more than 140 web sites, online communities, directories, CD-ROMs and extensive databases serving 18 markets.
- Reed Exhibitions, the world's leading organizer of trade and consumer events with more than 470 events in 29 countries. Reed Exhibitions organizes 60 shows in the U.S. that attract more than 26,000 exhibitors and more than one million visitors to the host cities.
- Harcourt Education Group is a leading U.S. educational publishing company serving the K-12 market.
- LexisNexis is the preferred provider of decision support information and services to legal, business and government professionals, with over 3 million subscribers.
- Elsevier, a leading supplier scientific, technical and medical information to research libraries and scientists. Elsevier publishes 1,200 journals containing 160,000 articles a year, 400 books, as well as CD-ROMs and online products.

² Reed Elsevier's Petition for Reconsideration is included as reference as Attachment A hereto

Legal Standard

The PRA requires that prior to approving an agency's "proposed collection of information, the Director [of OMB] shall determine whether the collection of information by the agency is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility." 44 U.S.C. § 3508. In its submission to OMB, the FCC is required to set forth an accurate estimate of the burden that shall result from the collection of information so that the Director can determine whether to approve the collection of information. § 3507(a)(1)(D)(i)(V).

In addition, the Director may disapprove any collection of information contained in the final rule, if "(i) the Director determines that the agency has substantially modified in the final rule the collection of information contained in the proposed rule; and (ii) the agency has not given the Director the information required under paragraph (1) with respect to the modified collection of information, at least 60 days before the issuance of the final rule." § 3507(d)(1)(4)(D)

The rules implementing the PRA provide more specificity governing OMB's evaluation

To obtain OMB approval of a collection of information, an agency shall demonstrate that it has taken every reasonable step to ensure that the proposed collection of information (i) is the least burdensome necessary for the proper performance of the agency's functions to comply with legal requirements and achieve program objectives; . . . (iii) has practical utility. The agency shall also seek to minimize the cost to itself of collecting, processing, and using the information, but shall not do so by means of shifting disproportionate costs or burdens to the public.³

Practical utility means the actual, and not merely the theoretical or potential, usefulness of information to or for an agency, taking into account its accuracy, validity, adequacy and reliability, and the agency's ability to process the information it collects (or a person's ability to receive and process that which is disclosed, in the case of a third-party or public disclosure) in a useful and timely fashion. . . . OMB will take into account whether the agency demonstrates actual timely use for the information either to carry out its functions or make it available to third-parties⁴

³ 5 C F R §1320 5(d)(1)

⁴ 5 C F R §1320 3(l)

Agencies, in their submissions to OMB, must be able to show, *inter alia*, “a specific, objectively supported estimate of burden.”⁵

Impact of the Fax Consent Rule

In its submission to OMB, the FCC maintained the following with respect to the information collection requirements imposed by the Fax Consent Rule:

Under the old rules, companies that advertised via fax already maintained customer lists with facsimile numbers. Therefore, the additional recordkeeping burden of obtaining a recipient’s written permission, including their signature, will be minimal. . . . Annual burden hour per respondent 0.5. Total “in house” costs . . . : \$195,000. ⁶

Reed Elsevier vigorously disputes the accuracy of the FCC’s observations and the characterization of the impact of the information collection requirements associated with the Fax Consent Rule as “minimal.” The “objectively supported burden” required by OMB’s rules is sorely lacking in the FCC’s submission.

The fact that companies already possess the fax numbers of their customers does not alleviate the burden in collecting written consent. The FCC specifically prohibited fax senders from requesting by fax that recipients fax or mail in a written consent to receiving fax solicitations. TCPA Order at ¶193. Therefore, companies must have additional contact information in order to distribute their requests by another means, such as e-mail or direct mail. In many cases, Reed Elsevier does not have complete contact information for all customers other than fax numbers. This not insubstantial cost of simply gathering the additional contact information needed to distribute a request for written consent does not appear to have been factored into the FCC’s calculations. Further, it will likely require multiple mailings to obtain written consent since many customers will not respond to the first mailing.

The FCC’s estimate that each respondent will have to spend only one half of an hour to send, collect and store the written consents is grossly inadequate. Reed Exhibitions alone has over 700,000 customers to whom it sends faxes about trade shows. Collecting contact information, preparing the fax consents, sending the consents and receiving the consents would require substantially more than one half hour for Reed Exhibitions. Even more tellingly, among its periodicals, RBI has *millions* customers who subscribe to free “requester” publications that

⁵ 5 C F R §1320.8(a)(4)

⁶ Supporting Statement of the FCC, OMB Control No. 3060-0519 (July 2003) (the “Supporting Statement”) at 13

are paid for by advertisers. The Commission's position that RBI ought to spend no more than one half hour in total to obtain the signed, written consent of its millions of customers is simply implausible.

Reed Elsevier's numerous divisions will be required to put entirely new record keeping procedures and infrastructure into place in order to comply with the new fax consent requirement. The FCC is not simply requiring that Reed Elsevier make a notation not to send advertisements to the fax number or to remove the fax number from its list. Rather, Reed Elsevier will need to maintain a copy of the fax number and signature indicating consent. Currently, Reed Elsevier is able to obtain a fax number where a business relationship exists, enter it into the computer, and then throw out the paper copy. The new rule will require Reed Elsevier to set up a filing system including purchasing cabinets and tracking mechanisms and/or to scan such documents into a computer to track them. Such measures consume significant resources.

Similarly, Reed Elsevier, in many cases, will be required to create a system so that when sending fax advertisements to existing customers, such faxes are only sent with consent. Given the breadth of the FCC's definition of what constitutes an "advertisement" in the fax context, Reed Elsevier's divisions will need to put procedures into place to review all of the faxes prior to their being sent to determine whether or not they contain an advertisement. Reed Elsevier sends millions of faxes to its customers; the primary purpose of many of these faxes is not advertising, but they may contain materials that would be considered an advertisement under the FCC's rules.

For these reasons, the dollar figure impact provided by the FCC is grossly underestimated. The FCC's estimate that all entities affected by the Fax Consent Rule would spend a cumulative amount of \$195,000 dollars is not sustainable.

Additionally, alternative forms of communication with existing customers required to obtain consent will cost far greater than the \$195,000. In Reed Elsevier's experience, direct mail costs are 500 to 600% higher than costs of faxing, thus the cost of sending out the consent requests itself is substantial. As a reference, one recent RBI survey faxed to companies in the home manufacturing sector cost \$351; the estimated cost for a direct mail of the survey was \$2,600. It is conservative to state that Reed Elsevier's various divisions cumulatively will incur costs in excess of \$100,000 to prepare, send, and collect fax consents. Thus, the tens of thousands of entities subject to the Fax Consent Rule will incur costs many times the FCC's estimate.

The FCC's estimates appear to ignore the requirement to maintain the written consents. For Reed Elsevier, keeping fax consents means tracking literally millions of pieces of paper. Even if the consents are converted to electronic documents, the scanning and retention costs do not appear to be included. In addition, the administrative impact of keeping track of two different customer lists – those whose consents have been received, and to whom faxes may be

sent, and those who have not provided written consent -- does not appear to have been figured in the FCC's analysis.

Further, the FCC's submission does not demonstrate that the Fax Consent Rule is the "least burdensome necessary" in order to ensure that the "prior express invitation or permission" required by the TCPA. As Reed Elsevier and countless other parties have informed the FCC, the written consent requirement is the *most* burdensome way of finding that the statutory standard has been met. The FCC could require many other indicia of consent other than the requirement to collect and store a written consent to receive faxes. Similarly, the "practical utility" of the requirement to collect and keep the fax consents is dubious. The FCC has made no demonstration that either it or third parties need to have access to the hundreds of millions of faxes that must be gathered and maintained as a result of the Fax Consent Rule. The FCC has done exactly that which is proscribed by the PRA rules by shifting the enormous costs associated with gathering and storing written fax consents. Accordingly, Reed Elsevier respectfully submits that the FCC has not met the requirements of the PRA and its implementing rules.

Conclusion

In sum, the Supporting Statement is woefully inaccurate in realistically assessing the costs, both in time and in dollars, of the Fax Consent Rule. The Supporting Statement plainly does not meet the legal standards for OMB's approval. Therefore, Reed Elsevier respectfully requests that OMB reject the FCC's request for approval of the Fax Consent Rule under the PRA. Reed Elsevier's substantive arguments why the FCC should consider the Fax Consent Rule are contained in its Petition for Reconsideration to the FCC, attached hereto as Attachment A.

Finally, OMB should not approve the information collection requirements imposed by the Fax Consent Rule because such information collection practices were never proposed by the Commission in its NPRM, as required by the PRA. While the FCC asked for comment on whether to retain the established business relationship exemption for faxes, it never proposed a rule requiring fax senders to obtain written consent before faxing advertisements. Thus, the FCC failed to satisfy § 3507(d)(1)(4)(D) of the PRA.

Thank you for your consideration.

Sincerely,



Ronald L. Plessner

Counsel to Reed Elsevier Inc

cc Leslie Smith (FCC)
Steven Manzo

Attachment A

**Before the
Federal Communications Commission**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	

**PETITION FOR RECONSIDERATION
OF REED ELSEVIER INC.**

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August 25, 2003

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Summary

Reed Elsevier Inc. (“Reed Elsevier”), whose many divisions communicate with their millions of business customers by fax and who would be severely burdened by a requirement to obtain written consent, requests reconsideration of the Commission’s interpretation of what is needed to demonstrate the “prior express invitation or permission” in order to send faxes as required by the Telephone Consumer Protection Act (the “TCPA”). There is nothing in the text or the legislative history of the TCPA that obligates the Commission to impose a requirement that consent to receiving faxes must be signed and in writing. Indeed, Congress was not concerned about the business-to-business context, and the Communications Act and other privacy statutes demonstrate that when Congress wanted to require a signed, written consent, it said so explicitly. Further, the Commission’s written consent requirement restricts non-misleading, lawful commercial speech, and may not satisfy the *Central Hudson* standard, as applied to Commission privacy regulations in *U.S. West*.

Reed Elsevier’s experience demonstrates that the Commission’s assumption that “even small businesses may easily obtain permission from existing customers who agree to receive faxed advertising” is incorrect. The written consent requirement would be extraordinarily burdensome and costly for Reed Elsevier to implement. This would require Reed Elsevier to divert valuable resources away from producing products and services to perform a number of additional “record keeping” and administrative activities, including assembling the complete contact information for each customer, mailing multiple notices to customers to gather written consent, and the processing, coding and storage of the millions of fax consents obtained. Although the opt-out fax rate by Reed Elsevier’s customers is very low, indicating a desire to receive the information the company faxes them, response rates to mailings asking for a written

consent are expected to be low, as people may not bother to send back the signed forms. Reed Elsevier suggests an alternative in the context of business-to-business faxing, in which an established business relationship, with notice and an opportunity to opt-out, or the business recipient's affirmative interest, with notice and opt-out would be sufficient.

Irrespective of whether the Commission changes its decision on written consent, Reed Elsevier requests that the compliance deadline be one year from the date of the Commission's order on reconsideration to implement the new rule, notwithstanding the Commission's grant of a stay. This is needed because of the burden of shifting from one medium to another, given the annual meeting or subscription renewal process of most of Reed Elsevier's impacted businesses. Further, in the event the Fax Consent Rule is not changed, Reed Elsevier requests that the Commission clarify that subscription renewals and offers that are ancillary to an already-completed transaction are not "advertisements" subject to the rule.

**Before the
Federal Communications Commission**

In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	
)	

PETITION FOR RECONSIDERATION

Reed Elsevier Inc. ("Reed Elsevier"), by and through its attorneys, and pursuant to 47 C.F.R. § 1.429, hereby petitions the Commission to reconsider that portion of the TCPA Order¹ interpreting Sections 227(a)(4) and 227(b)(1)(C) of the Telephone Consumer Protection Act (the "TCPA"), codified at 47 U.S.C. § 227(a)(4), (b)(1)(C), to require a signed, written consent to receiving facsimile advertisements, as set forth in 47 C.F.R. § 64.1200(a)(3)(i), as amended (the "Fax Consent Rule").

I. Background and Summary

A Reed Elsevier's Businesses

Reed Elsevier is one of the world's leading publishing and information companies, employing more than 20,000 people in the United States. Reed Elsevier provides critical information in both hard copy and electronic formats to the government, scientific, legal, educational, and business communities. Within these identified market segments, Reed Elsevier offers a wide array of information-driven services and solutions to businesses. Reed Elsevier businesses and services include:

- Reed Business Information ("RBI"), the largest publisher of business and professional publications in the United States. RBI maintains a long tradition of

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, FCC 03-153 (released July 3, 2003) (the "TCPA Order")

providing business information through more than 150 targeted print magazines, including *Multichannel News* and *Broadcasting and Cable*, more than 140 web sites, online communities, directories, CD-ROMs and extensive databases serving 18 markets.

- Reed Exhibitions, the world's leading organizer of trade and consumer events with more than 470 events in 29 countries. Reed Exhibitions annually organizes 47 shows held in a variety of cities across the U.S. that attract more than 26,000 exhibitors and more than one million visitors to the host cities.
- Harcourt Education Group, a leading U.S. educational publishing company serving the K-12 market.
- LexisNexis, the preferred provider of decision support information and services to legal, business and government professionals, with over 3 million subscribers.
- Elsevier, a leading supplier of scientific, technical and medical information to research libraries and scientists. Elsevier publishes more than 1,200 journals containing more than 160,000 articles a year, 400 books, as well as CD-ROMs and online products.

B Reed Elsevier's Faxing Policies and Participation in the Proceeding

Reed Elsevier sends faxes to existing customers and to those who have affirmatively inquired about becoming a customer. These faxes are offers of enhancements for or renewals of existing products, as well as faxes sent to confirm an order for a particular transaction. Given the breadth of the TCPA's definition of what constitutes "unsolicited advertising," many of these faxes possibly could be construed as advertising subject to the Fax Consent Rule. In Reed Elsevier's case, they are integral components of its regular communications with customers.

LexisNexis' business practices are instructive of the circumstances under which Reed Elsevier sends a fax. Frequently, lawyers contact LexisNexis by telephone to obtain access to online research services. A representative of LexisNexis will discuss products and services with the caller and, at the request of the caller, will send a subscription agreement by fax for the caller

to sign and return. Upon execution of the agreement the caller becomes a subscriber, is issued a system ID and password, and obtains immediate access to the online service.

LexisNexis also communicates with existing subscribers by fax to notify them of enhancements to the online service and to notify them of new products and services. Faxes are used because law firms routinely maintain common fax machines, as contrasted with private e-mail addresses. Faxes describing service enhancements or new products are more easily delivered to the appropriate person within the firm when sent by fax than is often the case when sent by e-mail. Frequently these faxes generate follow-up information requests and subscription enhancements by customers who would not otherwise know of these new offerings.

In its comments in this proceeding, Reed Elsevier urged the Commission not to adopt the Fax Consent Rule, but rather to retain its previous interpretation that an established business relationship (“EBR”) could serve as the “prior express invitation or permission” needed under the TCPA to permit Reed Elsevier to continue to send faxes to its existing customers. On August 12, 2003, Reed Elsevier filed a motion with the Commission to stay the Fax Consent Rule pending its decision on reconsideration, or, at least for one year after the Fax Consent Rule’s effective date (the “Stay Motion”).³

C. Impact of Fax Consent Rule

Compliance with the Commission’s newly adopted interpretation of “express invitation or permission” would require Reed Elsevier to incur significant expense to obtain the necessary contact information so that it may communicate with its customers by non-fax means to get the

written consent needed under the revised rule to fax. For example, RBI communicates with many of its customers by fax to renew their subscriptions to free, advertiser-supported, niche trade publications. Reed Exhibitions communicates with more than 700,000 established customers through fax to allow them to register to attend and to reserve exhibit space for upcoming trade shows (which, on a company-wide average, over 59% do). Importantly, Reed Exhibitions communicates frequently with exhibitors at these shows, arranging for critical supplemental services for their exhibit space (e.g., telephone lines, electrical service, shipping instructions, security) and options which help them project the desired image (e.g., carpet, catering, flowers, signage, etc.), realizing the most productive experience possible for the exhibit space. These faxes could be seen as advertising additional services within the scope of the definition of "advertisement" set forth in the TCPA.⁴

Often, Reed Exhibitions does not have the contact information necessary to send e-mail to its customers. At present, Reed Exhibitions has e-mail addresses for only about 60 percent of its customers. Where e-mail addresses do exist, the addresses tend to be specific to individuals, as contrasted with fax numbers, which tend to be more broadly applicable to the organization. In an industry that experiences rapid staffing changes, the individual that arranged for exhibit space last year may no longer be with the exhibitor. An e-mail sent to an old e-mail address may never be opened or acknowledged. With faxes, the ultimate recipient routinely is the individual to whom the fax is addressed or the individual who is their replacement.

(footnote continued from previous page)

³ On August 18, 2003, the Commission granted a stay, until January 1, 2005, both of its interpretation that an EBR is insufficient to indicate prior express invitation or permission and of the requirement of a written consent. See *Order on Reconsideration*, FCC 03- 308 (released Aug. 18, 2003).

Direct mail, while viable for some purposes, is frequently too slow for the types of decisions to be made and the short deadlines experienced in preparing a show. Direct mail is also much more expensive than faxing; Reed Elsevier's direct mail costs are between 500 and 700 percent of the cost of faxing the same information. Using surveys distributed by RBI as an example of relative costs, a recent RBI survey faxed to companies in the home manufacturing sector cost \$351; the estimated cost for a direct mail of the survey was \$2,600. Contrary to the Commission's findings (which largely concerned individual consumers, as opposed to business customers), Reed Exhibitions' experience shows that faxes are welcomed by a large percentage of existing customers. Reed Exhibitions regularly receives high sale rates from its faxes to customers, and the rate of customer opt-outs, which are offered on every fax, is less than one percent.

The process of collecting and maintaining the consents required by the Fax Consent Rule would also impose significant costs. Reed Elsevier does not keep every fax that is sent out and received; information related to an order is inputted into a computer database. Even a company the size of Reed Elsevier is not presently equipped to comply with the Fax Consent Rule, which requires that an actual or scanned copy of the consent be collected and stored. Whether kept in hard copy or scanned into a computer database, keeping the consents for all of its customers will be extremely burdensome. RBI expects to send 2.2 million faxes to subscribers this year; costs for collecting and keeping records of consents for every subscriber would be significant.

(footnote continued from previous page)

⁴ 47 U.S.C. § 227(a)(4), defining "unsolicited advertisement" as "any material advertising the commercial availability or quality of any property, goods or services"

Many of Reed Elsevier's transactions could no longer be completed under the proposed written signature requirement imposed by the Commission. For example, LexisNexis would be prohibited from sending to a lawyer a copy of its rate schedule by fax even though the lawyer has given express verbal consent and provided a fax number. Instead, LexisNexis would need to send the agreement by mail, courier, or e-mail or to seek express written authorization from the customer before a request can be honored. The notion that this cumbersome process is necessary to protect these businesses and that this process does not create a significant new burden on the parties to the transaction is misguided.

D Summary of Impact of Alternatives to Faxing

Reed Elsevier's experience is that faxes are frequently the most effective means of communicating with business customers. Direct mail is too slow and too costly, often ignored, and difficult to time for maximum effect. E-mail is too specific to an individual when the customer is a company rather than an individual, increasingly filtered by anti-spam software and also not read nearly as often as faxes. Faxes, on the other hand, are inexpensive, timely, easily forwarded to the proper person, and more likely to be personally handled and reviewed.

II. Nothing in the TCPA or its Legislative History Compels the Commission to Require Written Consent for Faxes to Customers in the Business-to-Business Context.

The TCPA does not require that a customer's consent to receive faxes from a business be in writing. Rather, it requires anyone sending a fax of what would be deemed an "unsolicited advertisement" to obtain the recipient's "prior express invitation or permission." 47 U.S.C. § 227(a)(4). There is nothing in the text of the TCPA indicating that the consent must be in

writing. As set out in more detail below, Reed Elsevier believes that faxes in the business-to-business context should not require written consent.⁵

The legislative history of the TCPA demonstrates that Congress was concerned primarily about faxes to *consumers* from entities with whom the recipient has no relationship. Congress objected to “junk faxes” that imposed costs on consumers, who must pay for toner and printing. S. Rep. No. 178, 102d Cong. 1st Sess. 2-4, 6 (1991) (“Senate Report”). Business-to-business (“B-to-B”) communications were not the focus. In the B-to-B context, where the recipient has evidenced an interest in receiving a fax, faxes sent to existing customers and applicants are not “junk faxes,” because they are being directed to specific recipients and not sent to a list of randomly selected individuals. Indeed, Reed Elsevier’s success rates for faxes sent to its business customers, indicated by both a high response rate and low opt-out rate, demonstrate that many such customers want to receive these faxes.

The legislative history of the TCPA shows that Congress would specify a written consent requirement if it wanted to impose such a requirement. With respect to prerecorded messages and the use of automated dialing devices, Congress drafted a writing requirement. Senate Report at 4 (“[T]he reported bill does not include the requirement included in the bill as introduced the requirement that any consent to receiving an automated call be in writing.”). While this writing requirement was removed from the TCPA prior to passage, the draft shows that Congress could have specifically required a written consent had it wanted to do so.

Provisions of the Communications Act further support the conclusion that written consent was not contemplated when Congress specified “prior express invitation or permission” for

⁵ Reed Elsevier asserts that a distinction based on faxes sent to existing business customers and faxes sent to consumers is administratively practical because senders transmitting faxes to existing customers know that those

(footnote continued to next page)

faxes. Where Congress wanted to impose a writing requirement, it made that requirement explicit. For instance, Section 631 of the Communications Act obligates cable operators to notify their subscribers in writing of their policies on collection and disclosure of personally identifiable information: "...a cable operator shall provide notice in the form of a separate, written statement" 47 U.S.C. § 551(a)(1). Similarly, Section 231(d)(1)(A) of the Communications Act, governing disclosure of information collected for the purpose of restricting access to communications of material harmful to minors, requires "prior written or electronic consent" of the individual or his or her parent or guardian. 47 U.S.C. § 231(d)(1)(A). Outside of the privacy context, Congress made written consent explicit in Section 615(c) of the Communications Act, which governs the circumstances under which a cable operator and a noncommercial educational broadcast station may waive carriage requirements for existing stations. 47 U.S.C. § 535(c).

Similarly, in other privacy contexts, Congress clearly and explicitly evidenced its intent for a written consent requirement in the text of the statute. In the Family Educational Rights and Privacy Act, Congress required, as a condition of funding, that educational agencies obtain "written consent from the student's parents specifying records to be released." 20 U.S.C. § 1232g(b)(2)(A). In the Video Privacy Protection Act, Congress provided that a video tape service provider may disclose personally identifiable information concerning any consumer "to any person with the informed, written consent of the consumer given at the time the disclosure is sought." 18 U.S.C. § 2710(b)(2)(B). Clearly, where Congress wanted written consent, it required it explicitly in the text of the statute.

(footnote continued from previous page)
numbers are for business purposes and are not used by consumers

According to fundamental tenets of statutory construction, words of a statute should be accorded their plain meaning.⁶ The American Heritage Dictionary (3rd Ed. 1994) defines an “invitation” as a “request for someone’s presence or participation.” Similarly, “permission” is “consent” and “express” means “definitively and clearly stated.” Nothing in the plain meaning of the statutory text supports the Commission’s conclusion that the consent to receive faxes must be in writing. Accordingly, the FCC was outside of its discretion in adopting a rule that required the prior written consent of the recipient to receive faxes under the TCPA.

III. The Commission’s Requirement of Written Consent May Violate the First Amendment.

The Fax Consent Rule acts as a restriction on commercial speech by prohibiting non-misleading, legal communications until a written consent is obtained. Thus, it is evaluated under the *Central Hudson* standard. *Central Hudson Gas & Electric Corp. v. Public Service Comm’n*, 447 U.S. 557, 564 (1980). Under *Central Hudson*, the government must first establish a substantial interest that it intends to achieve through the regulation. Second, the regulation must directly and materially advance the asserted interest.⁷ In addition, the regulation must be narrowly tailored and no more extensive than necessary to serve the government’s substantial interest. *Central Hudson*, 447 U.S. at 566.

Applying this standard, the Tenth Circuit has required the Commission to demonstrate that obvious alternatives that are less burdensome are insufficient to protect consumer privacy. *U.S. West v FCC*, 182 F.3d 1224, 1238 (10th Cir. 1999). In the TCPA Order, the Commission based its decision to require written consent primarily on comments from individual consumers,

⁶ See, e.g., Norman J. Singer, *Sutherland’s Statutory Construction*, § 46.01 (6th ed. 2000).

consumer groups, and some small businesses, not in the business-to-business context between senders and their customers.⁸ There is scant record basis for the Commission to impose such a prior restraint in the business-to-business context, nor does the TCPA Order demonstrate that the Commission “specifically and adequately consider[ed]” less burdensome restrictions on speech, such as requiring indicia of invitation or permission other than a signed written consent form. *U.S. West*, 182 F.3d at 1238 & n.11. The Fax Consent Rule fails the requirement that restrictions on commercial speech be no more extensive than necessary to serve the governmental interest. There are legitimate alternative means in the context of business-to-business relationship, such as an EBR with notice and opt-out, or affirmative consent (even if verbal) with notice and opt-out, that would satisfy the Congressional interest and be consistent with the statutory requirement that a sender obtain express invitation or permission.

IV. Public Policy Considerations

The Commission justified in part its reversal of its earlier conclusion that an EBR was sufficient to find invitation or permission on its assumption that “even small businesses may easily obtain permission from existing customers who agree to receive faxed advertising.” TCPA Order at ¶ 191. Reed Elsevier’s methods of communicating with its range of customers indicate that, at least with respect to large companies with many divisions that rely on faxing, this assumption is clearly wrong. Even small companies will be significantly burdened by the requirement to collect and maintain written consent forms.

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⁷ See also *Greater New Orleans Broadcasting Ass’n v. U.S.*, 527 U.S. 173, 188 (1999); *Edenfield v. Fane*, 507 U.S. 761, 770 (1993).

⁸ TCPA Order at ¶¶ 188-189

As noted, Reed Elsevier communicates with many of its customers exclusively by fax. Its opt-out rate is less than one percent and its response rate (transactions generated from faxing) is high. Further, as discussed, the unnecessary additional expense of direct mail and the inadequacy of e-mail to ensure delivery of time sensitive information make these methods undesirable alternatives for Reed Elsevier to communicate with customers. While there may be record support for restricting faxes to consumers and home businesses, Reed Elsevier's experience demonstrates that the record support for the Commission's onerous requirement in the business-to-business context of a written consent is scant. Indeed, Reed Elsevier submits that in the business-to-business context, many of the faxes that would be prohibited under the Fax Consent Rule are currently welcomed by existing customers.

Compliance with the written consent requirement will be difficult, costly and time consuming and will ultimately produce less than complete results. It would also require Reed Elsevier to divert valuable resources away from producing products and services to perform a number of additional "record keeping" and administrative activities. In many cases Reed Elsevier will not be able to receive written consent in the time frame necessary to complete a pending transaction. In some cases, Reed Elsevier may only have a fax number and telephone number for the customer, not the physical address or e-mail address. While a direct mail campaign can be used in an attempt to obtain the necessary consents, given the traditionally low response rates experienced with direct mail, it may require multiple costly mailings that generate less than complete results. Each of these efforts will have significant economic costs and their respective shortcomings will result in unserved customers and lost customers.

The Fax Consent Rule also imposes secondary and tertiary costs on businesses. Even if Reed Elsevier is able to collect contact information to send out written requests for consent by

non-fax means, and even if it manages to collect a percentage of the signed, written consents needed to send faxes, its communications channels with customers are then bifurcated. For example, this year, RBI expects to send faxes to 2.2 million subscribers of its advertiser-supported publications, such as *Multichannel News* and *Broadcasting and Cable*. These are limited, infrequent requests to existing customers that must be sent out by requester publications under applicable Federal postal regulations to document that the publications are in fact requested by the recipient.⁹ Under the Fax Consent Rule, Reed Elsevier must establish separate lists and arrange separate distribution channels for customers that have and have not provided signed written consent. For some businesses, that effectively means an end to all faxes until *all* consents are attained. For businesses such as RBI and Reed Exhibitions, with its 700,000 customers, that ultimate goal of 100 percent written consent is unattainable, as a practical matter. In the event a new State or Federal law is enacted restricting unsolicited e-mail, each of Reed Elsevier's divisions would have to keep another category of customers who consent to receipt of Reed Elsevier faxes by e-mail. In addition, businesses must bear the costs of receiving, scanning and retaining evidence of the fax consents. Requiring companies to organize customer lists into multiple distribution channels and to save copies of written consents imposes significant additional costs beyond those of collecting the consents and moving from fax to other forms of content distribution.

⁹ See 39 C.F.R. Part 3001, Subpart C, Appendix A, Section 413.31 (requiring requester publications seeking to qualify for Periodicals class postage to show, *inter alia*, that 50% or more of the copies of the publication are provided free of charge to those who request it).

V. An Alternative Proposal for Finding “Prior Express Invitation Or Permission.”

In the TCPA Order, the Commission reversed its prior conclusion that an established business relationship was a sufficient indication of prior express invitation or permission, noting that nothing in the statute distinguished between residential and business fax lines, as in the portions of the TCPA restricting telephone solicitation to residential lines, and thus no inference could be drawn from the existence of an EBR. TCPA Order at ¶ 189. While this reasoning may present a rationale for not exempting business-to-business contacts *per se* from the TCPA’s restrictions on faxing, it does not require the Commission to impose a written consent obligation in the business-to-business context in order to be faithful to the TCPA. Under the statute, the Commission need only find that the recipient has provided “prior express invitation or permission” to receive the faxes.

Reed Elsevier proposes an alternative to determine when such invitation or permission exists in the business-to-business context. Under this alternative, the existence of an EBR with notice of the company’s faxing policies and the opportunity for the recipient to opt-out, or the business recipient’s affirmative interest in receiving faxes, along with notice and opt-out would be sufficient to satisfy the invitation or permission requirement in the TCPA.

The Commission could adopt this alternative to determine under what circumstances invitation or permission has been granted to send faxes. In the business-to-business context, where there is no risk of the harm identified in the TCPA’s legislative history of costs being imposed on consumers, where the recipient reasonably expects to receive such faxes, and where

there is already a relationship between business and customer, less explicit forms of consent, such as a telephone request or a click through on a Web site, should be acceptable.

The Commission could provide examples in its Order on reconsideration and/or its notes to the Fax Consent Rule to guide entities, much as it does to illustrate application of its attribution rules.¹² Such an alternative would be more faithful to the TCPA and less onerous for companies than the current requirement to obtain written consent.

A variable consent model has precedent in the privacy context. For instance, under the Children's Online Privacy Protection Act ("COPPA"), a Web site or service that is subject to COPPA must obtain "verifiable parental consent" before collecting, using, or disclosing personal information from a child.¹³ For a transition period that sunsets in April 2005, the FTC has adopted an approach to parental consent in which the required method of consent will vary based on how the operator uses the child's personal information. If the operator discloses the information to others or enables the child to disclose information to others via an e-mail account, chat room, message board, or other means, then a very reliable method of consent is required because the situation presents greater danger to children. If, on the other hand, the personal information "collected" from the child will be used only by the operator for internal purposes, then a less rigorous method of consent is required (*e.g.* through a delayed confirmatory e-mail). In addition, the Commission has used such models in other contexts, such as its evaluation of public interest considerations in the context of merger reviews.¹⁴

¹² See, *e.g.*, Notes to 47 C.F.R. §73.3555.

¹³ 15 U.S.C. § 6502(b)(1)(A)(ii); 16 C.F.R. § 312.3(b).

¹⁴ See, *e.g.*, *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation & AT&T Corp.*, 17 FCC Rcd 23246, ¶ 173 (2002) ("We also consider whether those benefits are merger-specific and verifiable, and we evaluate those benefits on a sliding scale: as the likelihood and magnitude of the potential harm

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VI. Time Frame for Compliance And Alternate Relief Requested.

In the Stay Motion, Reed Elsevier requested that the Commission stay the effective date of the Fax Consent Rule pending reconsideration or at least one year from the date it is scheduled to be effective after OMB approval. Stay Motion at 7-8. Although the Commission has granted a stay, Reed Elsevier reiterates its request that it should provide a minimum of a year from the date of its reconsideration decision to come into compliance. As noted, certain of Reed Elsevier's business divisions communicate with their customers only by fax and only annually. Obtaining their written consent would be burdensome and time consuming, and Reed Elsevier likely will wait for a decision on reconsideration before incurring the cost of sending out and collecting consent forms. Accordingly, an effective date of a minimum of a year after the release of a reconsideration order is appropriate.

In the event the Commission does not change its rule on reconsideration, Reed Elsevier respectfully requests that the Commission clarify that faxes related to certain kinds of transactions not be subject to the Fax Consent Rule. Advertiser-supported subscription renewals and offers of enhancements directly related to already purchased goods or services should not be considered "unsolicited advertisements" for purposes of the Fax Consent Rule. Advertiser-supported publications require no consideration as a condition of subscription; they are not "encouraging the purchase or rental of, or investment in, property, goods, or services." 47 U.S.C. § 227(a)(4). Similarly, ancillary transactions relate directly to an already-completed purchase should be considered part of the same purchase, outside of the Fax Consent Rule's

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increases, Applicants will be required to demonstrate that the claimed benefits are commensurately likely and substantial.") (footnotes omitted)

scope. Reed Exhibitions, which faxes offers for services to exhibitors who have already entered into a transaction to exhibit, should not be subject to the Rule.

VII. Conclusion

WHEREFORE, Reed Elsevier respectfully requests that the Commission amend the Fax Consent Rule to adopt an alternative for determining when "prior express invitation or permission" exists, or, in the alternative, that it delay compliance for at least one year after its decision on reconsideration to allow a reasonable time for entities to comply and clarify that certain business practices are outside the scope of the Rule.

Respectfully submitted,

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